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**Cc:** []  
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**From:** CN=Tom Hagler/OU=R9/O=USEPA/C=US  
**Sent:** Thur 7/15/2004 10:18:31 PM  
**Subject:** CALFED Update

I talked to Roger a couple days ago, and he wanted something in writing to memorialize the discussion. That's what this is all about.

----- Forwarded by Tom Hagler/R9/USEPA/US on 07/15/2004 03:07 PM -----

Tom Hagler  
07/15/2004 01:46 PM

**To:** Roger Gorke/DC/USEPA/US@EPA  
**cc:** Karen Schwinn/R9/USEPA/US@EPA  
**Subject:** CALFED Update

I wanted to give you an update on two different issues arising in the CALFED Bay Delta Program.

#### 1. Federal Legislation Authorizing the CALFED Bay Delta Program

As you know, Congress has struggled for the past three years to develop consensus on a federal bill authorizing the CALFED Bay Delta Program as outlined in the August 2000 Record of Decision. Last Friday, the House passed its current version of the authorization. We understand that discussions between the House and Senate are continuing, although it unclear whether there is sufficient momentum to move a final bill this session.

Both the House bill and the most recent Senate bill (Feinstein) have a more limited scope than the earlier versions. The authorization in each is for \$389 million, and both bills ask agencies to rely on existing authorizations for most of the program implementation. The most controversial aspects of the House bill are:

(1) Allowing the Secretary of the Interior to deem dam construction projects "authorized" absent contrary Congressional action.

(2) Using existing Central Valley Project Improvement Act (CVPIA) funds to pay for the CALFED Environmental Water Account and for purchasing water to meet state water quality standards.

The House bill has very little effect on EPA's programs. It authorizes EPA to participate as a nonvoting member in the new state agency Bay Delta Authority, and allows us to work on a federal cross cut budget and cooperation. But it explicitly does not provide any other new authorities, nor does it provide new money under our existing authorities.

Interior is serving as the Administration lead on these CALFED bills, and they have been effective at coordinating federal positions out here in California. EPA's position is that federal authorization would be helpful in moving the program forward. Nevertheless, given the minimal relationship between these bills and EPA's programs, we have not weighed in on the details, most of which affect only Interior.

#### 2. Federal Participation in the State Entity California Bay Delta Authority

In January 2003, a new state agency - the California Bay Delta Authority - was created by the state legislature to serve as the coordination and oversight agency for the CALFED Bay Delta Program. Six federal agencies, including EPA, were named to this Authority by the state legislation. We have since that time been working through all of the state/federal issues involved with having federal agencies participate on a state agency board.

In May of this year, contrary to everyone's expectations, the California Fair Political Practices Commission (FPPC) sent us an advice letter claiming that all federal participants are subject to the state ethics rules and must file state financial disclosure statements. Without going into all of the legal details, the federal agencies disagree based on sovereign immunity and the supremacy clause. The FPPC letter generated a lot of concern on the federal side, since it impacts not only the Bay Delta Authority but at least ten other state agencies that have federal agencies named to the boards.

After a lot of work with the state and federal agencies, the federal agencies decided to cease participating in these state agencies pending resolution of the issue. Federal counsel believed that this was the appropriate step, because the state could not assure us they would delay enforcement actions against our employees while we sort this out. For EPA, this meant that we have dropped off of five different state agencies.

We have worked at very high levels in the agencies and the Governor's office to get a resolution. As of today, there are two separate efforts within the state government to fix the problem. First, legislation is being introduced in the state legislature to "define us out" of the state statute, so that we can participate without being subject to the state rules. At the same time, the California Resources Agency is submitting a request for a reconsideration to the FPPC, arguing that the FPPC was incorrect in its advice letter and that we federal participants should not be subject to the state rules. If either effort succeeds, we will probably have a solution.

This is an awkward situation, but everyone in the state and federal government is pulling in the same direction to get it resolved. We anticipate getting some answers in the next month or so.

If you have any questions about either of these issues, please call me at (415)972-2945, or call Karen Schwinn at (415)972-3472.